

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Gregory Bernard Micklus, )  
9 Petitioner, )  
10 v. )  
11 Charles L. Ryan<sup>1</sup>, et al., )  
12 Respondents. )  
13

CV 02-1898-PHX-PGR (DKD)

**ORDER**

**(NON-DEATH PENALTY)**

14 Currently before the Court is the Report and Recommendation of Magistrate Judge  
15 Duncan (Doc. 73), which is based on Petitioner’s Petition for Writ of Habeas Corpus filed  
16 pursuant to 28 U.S.C. § 2254.<sup>2</sup> The Court will now consider *de novo* the Petition, the Report  
17 and Recommendation of Magistrate Judge Duncan, and the Petitioner's objections thereto.

18 In his objections, Petitioner begins by addressing the Magistrate Judge’s failure to  
19 consider the issue of actual innocence. In order to present otherwise procedurally barred  
20 claims to a federal habeas court, a petitioner must come forward with sufficient proof of his

21  
22 <sup>1</sup> Pursuant to Fed.R.Civ.P. 25(d), Charles L. Ryan, the current director of the Arizona  
23 Department of Corrections, is submitted for Dora B. Schriro .

24 <sup>2</sup> Petitioner was originally indicted for arson of an occupied structure with an  
25 allegation of five prior convictions. (Doc. #44, Exh A.) Two months later, he was indicted  
26 for conspiracy to commit the first degree murder of two witnesses in the arson case. (Id., Exh  
27 B, C.) At a separate trial, a jury acquitted him of the conspiracy charges (based on  
28 entrapment defense.) Thereafter, a jury convicted Petitioner of the arson charge. (Id., Exh  
H.) The trial court found two prior convictions and sentenced him to an aggravated term. (Id.,  
Exh I.) Petitioner challenges his state court conviction for Arson of an Occupied Structure  
and the imposition of an aggravated 28-year prison term. (Doc. 1.)

1 actual innocence. Actual innocence may be demonstrated when a petitioner “presents  
2 evidence of innocence so strong that a court cannot have confidence in the outcome of the  
3 trial unless the court is also satisfied that the trial was free of nonharmless constitutional  
4 error.” Schlup v. Delo, 513 U.S. 298, 316 (1995) A petitioner's “claim of innocence [under  
5 Schlup] is ... ‘*not itself a constitutional claim, but instead a gateway* through which a habeas  
6 petitioner must pass to have his otherwise barred constitutional claim considered on the  
7 merits.’ ” Id. (quoting Herrera v. Collins, 506 U.S. 390, 404). The Court finds that based on  
8 the findings of the trial court and jury, as well as the record as a whole, none of the evidence  
9 or circumstances raised by Petitioner establishes “actual innocence” sufficient to open the  
10 “gateway” through which an otherwise barred claim would be considered on the merits.<sup>3</sup> He  
11 has failed to convince this Court that he has reached his burden of establishing that “[this]  
12 court cannot have confidence in the outcome of the trial” Majoy v. Roy, 296 F.3d 770, 776  
13 (9<sup>th</sup> Cir. 2002.) The Court will not remove the case from the original jury, as Petitioner has  
14 failed to convince the Court that “it is more likely than not that no reasonable juror would  
15 have convicted him in light of “evidence newly presented to the habeas court “that was not  
16 presented at trial.” Sistrunk v. Armenakis, 292 F.3d 669, 673 (9<sup>th</sup> Cir. 2002). Accordingly,  
17 the Court will now review *de novo* the remaining matters raised in the Petition, the Report  
18 and Recommendation, and the Objections thereto.

19 As to Ground I, the Court agrees that no objective reading of State v. Terrazas, 189  
20 Ariz. 580 (1997) would put a state court on notice that a defendant was raising a federal  
21 claim. The issue in Terrazas, decided by the Supreme Court, is the proper standard which  
22 is most consistent with the Arizona Rules of Evidence for the admission of such evidence.

23 As to Grounds III, IV, and V, in an attempt to federalize his claims, Petitioner cited  
24 State v. Hunter, 142 Ariz. 88, 688 (1984), which cites State v. Mincey, 130 Ariz. 389, 398

---

25  
26 <sup>3</sup> Significantly, under the AEDPA, state court findings of fact are to be presumed  
27 correct unless petitioner rebuts the presumption with clear and convincing evidence. See 28  
U.S.C. § 2254(e)(1) Davis v. Woodford, 333 F.3d 982. 991 (9<sup>th</sup> Cir, 2003).

1 (1981), which in turn refers to Sandstrom v. Montana, 442 U.S. 510 (1979). However, the  
2 Court agrees with Magistrate Judge Duncan that a citation to Hunter does not satisfy the level  
3 of specificity required to provide the state courts a fair opportunity to act on Petitioner’s  
4 federal claim(s). Accordingly, Petitioner’s failure to adequately present his constitutional  
5 claims “before the Arizona Court of Appeals within the four corners of his appellate  
6 briefing” renders those claims unexhausted. Castillo v. McFadden, 370 F.3d 882, 887 (9th  
7 Cir. 2004)(A state appellate court is not required to review the parties’ pleadings “to see if  
8 it could discover for itself a federal, constitutional issue.”) Citing Baldwin v. Reese, 541 U.S.  
9 541 U.S. 27 (2004).

10 As to Grounds II, VI, and XI, the record reveals that Petitioner did not raise these  
11 claims on direct review or exhaust them on collateral review. Thus, they are precluded.

12 In Ground XIV, Petitioner did not refute the State’s claim of nonexhaustion in his  
13 Reply. Moreover, the claim was analyzed on its merits under inefficient assistance of  
14 counsel and it failed.

15 As to Ground XII, the trial court correctly found it precluded and additionally  
16 analyzed the claim under ineffective assistance of counsel, which failed.

17 As to Grounds VI through XXI, the Court has considered each claim on the merits as  
18 to Petitioner’s claims of ineffective assistance of counsel (trial and appellate) including:

- 19 (1) Trial counsel’s failure to call an alibi witness;
- 20 (2) Trial counsel inadequately cross-examined the state’s arson investigator;
- 21 (3) Trial counsel’s failure to raise a constitutional objection to the state’s use of  
22 Petitioner’s testimony from his conspiracy trial and appellate counsel’s failure  
23 to raise it as an issue on appeal;
- 24 (4) Trial counsel’s failure to object to the state’s improper comments during  
25 closing argument and appellate counsel’s failure to raise the issue on appeal;
- 26 (5) Trial counsel’s failure to insist that Petitioner’s prior convictions be tried to a  
27 jury and appellate counsel’s failure to raise the issue on appeal; and

1 (6) Appellate counsel's failure to raise the trial court's failure to give a Willits  
2 instruction.

3 Having determined that the substance of the above claims were properly rejected by the  
4 trial court, this Court finds that any related ineffective assistance claims are necessarily without  
5 merit. Accordingly, the Court agrees with Magistrate Judge Duncan's recommendation.<sup>4</sup>

6 Having reviewed *de novo* the Petition, the Report and Recommendation of Magistrate  
7 Judge Duncan, and the Petitioner's objections thereto, and in light of the Court's finding that  
8 the Petitioner's objections do not have any merit,

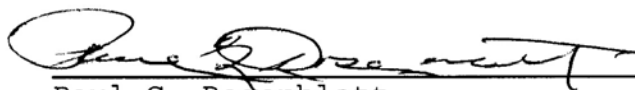
9 IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation  
10 (Doc. 73) is **ACCEPTED** and **ADOPTED** by the Court.

11 IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Doc.  
12 1) is **DISMISSED** and **DENIED** with prejudice.

13 IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed *in*  
14 *forma pauperis* on appeal are **DENIED**. Petitioner has not made a substantial showing of the denial  
15 of a constitutional right.

16 IT IS FURTHER ORDERED that the Clerk of the Court shall close this case.

17 DATED this 31<sup>st</sup> day of August, 2010.

18  
19   
20 Paul G. Rosenblatt  
21 United States District Judge  
22  
23  
24

---

25  
26 <sup>4</sup> The objections are enumerated as Ineffective Assistance of Trial Counsel 1,6,10,13,  
27 14, and Appellate Counsel 5, 6, 7, 8. The remaining ineffective assistance of counsel claims  
28 objected to by Petitioner as excused by a claim of actual innocence were found precluded.